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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION  
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12 APRIL J. MICHLES, ) Case No. ED CV 14-00343 (AS)  
13 Plaintiff, )  
14 v. ) MEMORANDUM OPINION AND  
15 ) ORDER OF REMAND  
16 CAROLYN W. COLVIN, Acting )  
Commissioner of Social )  
Security, )  
17 Defendant. )  
18

19 Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED  
20 that this matter is remanded for further administrative action  
21 consistent with this Opinion.  
22

23 PROCEEDINGS

24 On February 24, 2014, Plaintiff filed a Complaint seeking review of  
25 the denial of her application for Disability Insurance Benefits.  
26 (Docket Entry No. 1). The parties have consented to proceed before the  
27 undersigned United States Magistrate Judge. (Docket Entry Nos. 7-8).  
28 On June 30, 2014, Defendant filed an Answer along with the  
Administrative Record ("AR"). (Docket Entry Nos. 11-12). The parties  
filed a Joint Position Statement ("Joint Stip.") on December 18, 2014,

1 setting forth their respective positions regarding Plaintiff's claims.  
 2 (Docket Entry No. 20).

3  
 4 The Court has taken this matter under submission without oral  
 5 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social  
 6 Security Case," filed February 27, 2014 (Docket Entry No. 5).

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## BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On August 28, 2008, Plaintiff, formerly employed as a customer service representative at Mervyn's and a quality assurance and fingerprint clerk at an applicant support center, and currently serving as a volunteer school aide at her church, (see AR 16, 39-41, 43, 253), filed an application for Disability Insurance Benefits, alleging an inability to work since August 16, 2004. (AR 220-21).

On October 14, 2010, the Administrative Law Judge, Charles E. Stevenson ("ALJ Stevenson"), heard testimony from Plaintiff, medical expert Sami A. Nafoski, and vocational expert Alan Boroskin. (AR 81-99). On December 3, 2010, ALJ Stevenson issued a decision denying Plaintiff's application. (AR 105-17). After determining that Plaintiff had severe impairments -- "disorder of the cervical spine by disc bulge; disorder of the lumbar spine by disc bulging; status post hysterectomy; irritable bowel syndrome, stable; anxiety; and depression (AR 107-08)<sup>1</sup> --, ALJ Stevenson found that Plaintiff had the residual functional capacity<sup>2</sup> ("RFC") to perform light work<sup>3</sup> with the following limitations:

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<sup>1</sup> The ALJ found that carpal tunnel syndrome in the right hand and "tennis elbow" in the left hand were not medically determinable impairments. (AR 108).

<sup>2</sup> A Residual Functional Capacity is what a claimant can still do despite existing exertional and nonexertional limitations. See 20 C.F.R. § 404.1545(a)(1).

<sup>3</sup> "Light work involves lifting no more than 20 pounds at a time  
 (continued...)

1 lifting/carrying 20 pounds occasionally and 10 pounds frequently;  
2 sitting 8 hours in an 8-hour workday; standing/walking 6 hours in an 8-  
3 hour workday; allowed to change positions for 1 to 3 minutes every hour;  
4 occasional bending, stooping, crouching, crawling, kneeling; occasional  
5 working above-shoulder level with either upper extremity; and access to  
6 restroom facilities within 100 yards of the work site. (AR 110-16).  
7 Finding that Plaintiff could perform her past relevant work as a  
8 fingerprinting clerk and administrative clerk, ALJ Stevenson found that  
9 Plaintiff was not disabled from August 16, 2004 through March 31, 2010  
10 (the date last insured) within the meaning of the Social Security Act.  
11 (AR 116-17).

12 Plaintiff requested that the Appeal's Council review the ALJ's  
13 December 3, 2010 Decision. (AR 136). On March 12, 2012, the Appeals  
14 Council remanded the matter in order for the ALJ to do the following:  
15 (1) "[A]rticulate in work related terms how the claimant's moderate  
16 limitations with regard to concentration, persistence or pace would  
17 impact her ability to perform [fingerprinting clerk and administrative  
18 clerk] jobs or other work available in the national economy"; (2) "Give  
19 further consideration to the claimant's maximum residual functional  
20 capacity and provide appropriate rationale with specific references to  
21 evidence of record in support of the assessed limitations"; and (3)  
22 "Further evaluate whether the claimant has any past relevant work". (AR  
23 123-24).

24 On September 6, 2012, another Administrative Law Judge ("ALJ"),  
25 Tamara Turner-Jones, heard testimony from Plaintiff and vocational  
26 expert Gloria Lasoff. (AR 35-78). On November 2, 2012, ALJ Turner-  
27 Jones issued a decision denying Plaintiff's application. (AR 11-21).  
28 After finding that Plaintiff had the same severe impairments as before

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<sup>3</sup> (...continued)  
with frequent lifting or carrying of objects weighing up to 10 pounds."  
20 C.F.R. §§ 404.1567(b) and 416.967(b).

1 (AR 14), the ALJ found that Plaintiff had the RFC to perform light work  
2 in that she can lift and/or carry 20 pounds occasionally and 10 pounds  
3 frequently; can stand and/or walk for 6 hours out of an 8-hour workday  
4 with regular breaks; can sit for 6 hours out of an 8-hour workday with  
5 regular breaks; occasionally kneel, stoop, crawl and crouch; can  
6 occasionally climb ramps and stairs (but never climb ladders, ropes or  
7 scaffolds); can frequently use the right hand for gross and fine  
8 manipulation; no restriction in her use of the left upper extremity;  
9 occasionally reach overhead bilaterally; can frequently fully rotate her  
10 neck from side to side; should avoid exposure to extremely cold  
11 temperatures, unprotected heights and dangerous moving machinery; can  
12 sustain concentration and attention, persistence and pace in at least  
13 two hour blocks of time; can interact appropriately with co-workers and  
14 supervisors (but needs casual, non-intense interaction with the general  
15 public); is limited to simple, routine and repetitive tasks, due to a  
16 low tolerance for stress; needs a work environment with access to a  
17 bathroom within 50 feet; needs an environment with no fast-paced  
18 production requirements or assembly line work; and needs a cane for  
19 prolonged walking and/or walking on moving or uneven surfaces. (AR 15-  
20 19). After finding that Plaintiff was unable to perform any past  
21 relevant work (AR 19), the ALJ found that there were jobs that existed  
22 in significant numbers in the national economy that Plaintiff could  
23 perform, and therefore that Plaintiff was not disabled within the  
24 meaning of the Social Security Act. (AR 20-21).

25 Plaintiff requested that the Appeals Council review the ALJ's  
26 decision. (AR 5). The request was denied on February 4, 2014. (AR 1-  
27 3). The ALJ's decision then became the final decision of the  
28 Commissioner, allowing this Court to review the decision. See 42 U.S.C.  
§§ 405(g), 1383(c).



1 After summarizing Plaintiff's testimony at the more recent  
2 (September 6, 2012) administrative hearing concerning her symptoms and  
3 limitations (see AR 16-17), the ALJ stated: "The undersigned finds the  
4 claimant's allegations concerning the intensity, persistence and  
5 limiting effects of her symptoms are less than fully credible. The  
6 allegations of disabling back, neck and shoulder pain, irritable bowel  
7 syndrome, GERD and stress are inconsistent with the objective medical  
8 evidence, which indicates an attempt by the claimant to exaggerate the  
9 severity of her symptoms." (AR 17-18).

10 After noting that "[t]he prior decision clearly outlined why the  
11 claimant's alleged physical impairments are not disabling, mainly citing  
12 that the severity alleged by the claimant was not supported by the  
13 record as a whole, relying on the testimony of medical expert Dr.  
14 Nafosi" (AR 18), the ALJ noted that, based on the Appeals Council's  
15 Order of remand, the ALJ was going to focus on Plaintiff's alleged  
16 mental limitations. (AR 18).

17 Following a summary of Plaintiff's testimony about stress related  
18 to working with others, the ALJ concluded: "After careful consideration  
19 of the evidence, the undersigned finds that the claimant's medically  
20 determinable impairments could reasonably be expected to cause the  
21 alleged symptoms; however, the claimant's statements concerning the  
22 intensity, persistence and limiting effects of these symptoms are not  
23 credible to the extent that they are inconsistent with the above  
24 residual functional capacity assessment." (Id.).

25 A claimant initially must produce objective medical evidence  
26 establishing a medical impairment reasonably likely to be the cause of  
27 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.  
28 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a  
claimant produces objective medical evidence of an underlying impairment  
that could reasonably be expected to produce the pain or other symptoms  
alleged, and there is no evidence of malingering, the ALJ may reject the

1 claimant's testimony regarding the severity of his pain and symptoms  
2 only by articulating specific, clear and convincing reasons for doing  
3 so. Brown-Hunter v. Colvin, \_\_ F.3d \_\_, 2015 WL 462013 \* 5 (August 5,  
4 2015) (citing Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir.  
5 2007)); see also Smolen v. Chater, supra; Reddick v. Chater, 157 F.3d  
6 715, 722 (9th Cir. 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792  
7 (9th Cir. 1997). Because the ALJ does not cite to any evidence in the  
8 record of malingering, the "clear and convincing" standard stated above  
9 applies.

10 Here, the ALJ failed to provide clear and convincing reasons for  
11 her finding that Plaintiff's testimony about the intensity, persistence  
12 and limiting effects of the symptoms was not fully credible.

13 The Court rejects Defendant's assertion (see Joint Stip. at 9-11),  
14 that the ALJ's finding about Plaintiff's credibility was related to ALJ  
15 Stevenson's earlier finding about Plaintiff's credibility. While the  
16 ALJ was aware of ALJ Stevenson's credibility analysis (see AR 16, 18),  
17 the ALJ did not expressly rely on, or incorporate by reference, that  
18 analysis in making a determination of Plaintiff's credibility with  
19 regard to her testimony at the recent administrative hearing. Thus, the  
20 reasons given by ALJ Stevenson for finding that Plaintiff was not fully  
21 credible have no bearing on whether the ALJ provided clear and  
22 convincing reasons for finding Plaintiff not fully credible with respect  
23 to the testimony that was provided at the September 6, 2012 hearing.<sup>4</sup>

24 The one and only reason given by the ALJ -- the lack of objective  
25 medical evidence for Plaintiff's limitations (see AR 17-19) -- cannot,  
26 by itself, support the credibility finding. See Rollins v. Massanari,

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27 <sup>4</sup> The Court will not consider reasons for finding Plaintiff not  
28 fully credible (see Joint Stip. at 9-14) that were not given by the ALJ  
in the 2012 Decision. See Pinto v. Massanari, 249 F.3d 840, 847-48 (9th  
Cir. 2001); SEC v. Chenery Corp., 332 US 194, 196, 67 S.Ct. 1575, 91  
L.Ed. 1995 (1947).

261 F.3d 853, 857 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 602 (9th Cir. 1998).

In addition, the ALJ erred in failing to give germane reasons for finding Plaintiff's husband's testimony did not credible. See Carmickle v. Commissioner, 533 F.3d 1155, 1164 (9th Cir. 2008); Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006); Smolen v. Chater, *supra*, 80 F.3d at 1288-89. The ALJ did not even mention Plaintiff's husband's testimony about her symptoms and limitations (*see* AR 259-66, 289-96), which was appropriate lay witness testimony. See Valentine v. Commissioner Social Security Admin., 574 F.3d 685, 694-95 (9th Cir. 2009) ("[F]riends and family members in a position to observe a claimant's symptoms and daily activities are competent to testify as to [his or] her condition."); Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987)("[D]escriptions by friends and family members in a position to observe [Plaintiff's] symptoms and daily activities have routinely been treated as competent evidence."). Contrary to Defendant's assertion (*see* Joint Stip. at 14-16), the ALJ's error in not assessing Plaintiff's husband's testimony is not harmless because, as discussed above, the ALJ did not provide proper reasons for finding Plaintiff not fully credible. See Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008 (an ALJ's error is harmless "when it is clear from the record . . . that it was 'inconsequential to the ultimate nondisability determination.'"); *see also* Molina v. Astrue, 674 F.3d 1104, 1122 (9th Cir. 2012)("Because the ALJ had validly rejected all the limitations described the lay witnesses in discussing Molina's testimony, we are confident that the ALJ's failure to give specific witness-by-witness reasons for rejecting the lay testimony did not alter the ultimate nondisability determination.")).

#### **B. Remand Is Warranted**

The decision whether to remand for further proceedings or order an immediate award of benefits is within the district court's discretion.



1 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
2 useful purpose would be served by further administrative proceedings, or  
3 where the record has been fully developed, it is appropriate to exercise  
4 this discretion to direct an immediate award of benefits. Id. at 1179  
5 ("[T]he decision of whether to remand for further proceedings turns upon  
6 the likely utility of such proceedings."). However, where, as here, the  
7 circumstances of the case suggest that further administrative review  
8 could remedy the Commissioner's errors, remand is appropriate. McLeod  
9 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,  
211 F.3d at 1179-81.

10 Since the ALJ failed to properly assess Plaintiff's credibility and  
11 Plaintiff's husband's credibility, remand is appropriate. Because  
12 outstanding issues must be resolved before a determination of disability  
13 can be made, and "when the record as a whole creates serious doubt as to  
14 whether the [Plaintiff] is, in fact, disabled within the meaning of the  
15 Social Security Act," further administrative proceedings would serve a  
16 useful purpose and remedy defects. Burrell v. Colvin, 775 F.3d 1133,  
1141 (9th Cir. 2014)(citations omitted).<sup>5</sup>

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24 <sup>5</sup> The Court has not reached any other issue raised by Plaintiff  
25 except insofar as to determine that reversal with a directive for the  
26 immediate payment of benefits would not be appropriate at this time.  
27 "[E]valuation of the record as a whole creates serious doubt that  
28 Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,  
1021 (2014). Accordingly, the Court declines to rule on Plaintiff's  
claim regarding the ALJ's development and consideration of the  
vocational issues in this case (see Joint Stip. at 16-22). Because this  
matter is being remanded for further consideration, this issue should  
also be considered on remand, if necessary.

